Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

CINEMA '84, Richard M. Greenberg,
Tax Matters Partner,

Garlon J. Reigler, A non-participating partner,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"Nonparticipating partners" in TEFRA partnerships have a statutory right to a "tax matters partner" (TMP) to represent them in the partnership-level litigation. Where a TMP is disqualified during litigation and there are no eligible general partners remaining, the Tax Court has taken sole authority to appoint a replacement from the limited partners. Does the Tax Court have a duty to appoint a replacement TMP to represent the "nonparticipating partners"?

PARTIES TO THE PROCEEDINGS BELOW

Garlon J. Reigler was a non-participating partner in the Tax Court case and filed the appeal to the Second Circuit that gives rise to this petition.

With its decision, the Tax Court listed some of the other partners, participating and non-participating who, it asserted, were subject to that decision: O.D. Investments, John W. & Susan H. Chandler, James W. Cope, Alan J. Naness, Carl C. & Sally J. Risjord, Oliver S. & Mary R. Heard, Jr., Kenneth G. & Patricia Gamble, Frank P. & Rose Greenberg, Mohan S. & Kalyani Phanse, Joseph R. & Karen E. Pfeffer, Richard J. & Patricia A. Panico, Karl E. Epstein, MD, Joe B. & Joyce H. Cordell, Jeffrey B. Dubnow & Stephanie R. Lite, Jack & Shirlee Pines, Bill R. & Cheryl A. Ward, Barbara A. Riegler, John M. & Mary D. Kash, Tommy J. Shelton, Francis D. &, Mary D. Whitehurst, Raymond & Develya Cox, C. Don Cephus, Marilyn Elkins, James S. Greenwood, Tommy H. & Gaye W. Nelms, Frank F. & Nila J. McMordie, Lyman F. & Beverly J. Bush, James R. Fisher, Edmund T. & Yvonne S. Prendergast, Roger A. & Rebecca M. Myklebust, C. William & Charlotte I. Clay, Dick E. & Janet R. Jones, Henry J. & Shirlene Romain, P. Mary O'Brien, Stephen & Mercedes Lannes, Rena R. Carney, Jerry R. & Marlynne Olson, McMordie, Frank F. Jr. & Mike Elsea & Bones Investments, John Hobart McMordie Trust, Quaestor Alliance, Inc., Chesterwick Partners, and Friar Tuck Partners.[1] [App. 60-62][2]

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[1] Karin Locke was also listed by the Tax Court with its decision, but she was the Cinema '84 appellant in a prior appeal to the Second Circuit and, on remand, was dismissed from the Tax Court case prior to the appeal at issue here.

[2] References to [App. x] are to page number "x" of the Appendix attached to this petition for writ of *certiorari*.

These partners were bound by the Tax Court's decision. The Tax Court case was a partnership-level proceeding subject to TEFRA. Therefore, while they did not participate in the appeal to the Second Circuit at issue here these partners were, nonetheless, parties to that appeal and are subject to the outcome of this petition for writ of *certiorari*.

Finally, there are an unknown number of partners, both direct and indirect, that the Tax Court acknowledged were bound by its decision but whom it could not identify. Those unknown partners were also parties to the appeal below and are parties to the outcome of this petition for writ of *certiorari*.

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OPINIONS BELOW

The Tax Court opinion denying the petitioner's motion to vacate was published at *Cinema '84, Richard M. Greenberg, Tax Matters Partner v. Commissioner*, 122 T.C. 264 (2004). [App. 14-24]

On appeal, the Second Circuit's opinion was published at *Cinema '84, Richard M. Greenberg, Tax Matters Partner v. Commissioner*, 412 F.3d 366 (2nd Cir. 2005). [App. 1-13]

JURISDICTION

The Second Circuit entered its opinion on June 22, 2005. This petition is timely filed and this Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant portions of 26 U.S.C. §6231,[3] Treasury Regulations §§301.6231(a)(7)-1(a) through (1)(p), and Tax Court Rule 250 are reprinted in the appendix to this petition at App. 63-70.

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[3] Unless otherwise indicated all references to the "Internal Revenue Code," "I.R.C.," the "Code," "section," "Sec." or "§," are to the designated section of 26 U.S.C., as amended and effective for the years at issue.

INTRODUCTION

In TEFRA[4] partnership-level cases before the Tax Court the "nonparticipating" partners have a statutory right to a fiduciary tax matters partner (TMP) to represent their interests and inform them of the proceedings – similar to a class representative in a class action. Here the TMP was disqualified while the case was pending and there were no qualified general partners left from whom the limited partners could choose a replacement. In these circumstances, the Internal Revenue Code mandates that the IRS choose a replacement TMP from among the limited partners. But where suit has already been filed the Tax Court has barred the IRS from appointing a replacement TMP and taken for itself the sole authority to appoint a replacement TMP. But here the Tax Court failed to do so for over 10 years.

Instead the Tax Court assumed some, but not all, of the TMP's duties, including notices to some, but not all, of the partners about some of the partnership-level proceedings. But the Tax Court failed to assume all of the TMP's duties to the "nonparticipating" partners. Instead of representing their interests before the court the Tax Court instructed the partners to seek legal advise regarding a possible settlement from their adversary, the IRS. Further, the Tax Court failed to notify the partners that the IRS could impose a completely bogus liability for the 1988 tax year that had no basis in reality and which the partners could not foresee from the materials provided to them, assuming, *arguendo*, that they received them.

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[4] Partnership procedures at 26 U.S.C. §§6221-6233, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 ("TEFRA"), and as thereafter amended.